(2)

No. 09-1008

Supreme Court, U.S.
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In The
Supreme Court of the United States

MICHAEL SCOTT, ET UX.,

Petitioners,

v.

SAMUEL I. WHITE, P.C., ET AL.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO
THE SUPREME COURT OF VIRGINIA

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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JURISDICTION STATEMENT

Petitioners seek certiorari of state court decisions they allege violated their due process and equal protection rights under the Fourteenth Amendment and rights to petition courts under the First Amendment. In the Statement of the Case Petitioners assert that they raised the Constitutional issues in the trial court in response to objection to Michael Scott's nonsuit motion (Pet. 11) and again in their petition for appeal to the Supreme Court of Virginia (Pet. 12). However Rule 14.1(g)(i), Rules of the Supreme Court of the United States, requires that when review of a state court judgment is sought and federal questions are raised, the Statement of the Case must contain quotations from specific portions in the record where the matter appears. No such quotations from the record appear in the Statement of the Case. Further, Rule 14.1(i)(v) requires that an appendix include the material required in Rule 14.1(g)(i). No such material is included in the Appendix. With the failure to include in the Appendix any portion of the record of the trial court or their Petition for Appeal to the Virginia Supreme Court, where the constitutional issues now asserted where allegedly raised, the Court cannot determine whether or not Constitutional issues are being raised for the first time in this Court. The Court must therefore decline to exercise jurisdiction. *Cardinale v. Louisiana*, 394 U.S. 437, 438 (1969) (Court has no jurisdiction unless a federal question was raised and decided in the state court below.) See also Charles A. Wright, Arthur R. Miller & Edward H. Cooper, Federal Practice and Procedure, § 4022, at 322-23 (2d ed. 1996).

STATEMENT OF THE CASE

This is a Petition for Writ of Certiorari by career *pro se* litigant, Michael Scott ("Scott"), and his wife, Terry ("Terry Scott"), (collectively the "Scotts") seeking reversal of an Order of the Circuit Court of the City of Virginia Beach (the "trial court") entered on February 25, 2009, dismissing the instant case, the second of two cases they filed seeking to set aside foreclosures ("Virginia Beach II"). Scott was under a pre-filing injunction order entered by the Circuit Court of the City of Norfolk (the "Norfolk Court") on July 2, 2001 (the "2001 Order"). (App. 6.) The Scotts filed Virginia Beach II on June 9, 2008, but Scott failed to petition the Norfolk Court for leave to file the case. Respondents filed a Motion to Intervene and Show Cause in the Norfolk Court seeking a contempt citation with sanctions, including an order that Virginia Beach II be dismissed for violating the 2001 Order. (App. 44.) The Norfolk Court found Scott in civil contempt and on October 28, 2008, ordered that he dismiss Virginia Beach II (the "October Order"). (App. 39.) Rather than comply with the October Order, Scott sought to take a nonsuit of his involvement in Virginia Beach II while leaving his wife as a party to proceed. Respondents objected to the nonsuit and sought dismissal of Virginia Beach II as per the October Order. The Virginia Beach Court granted respondents' motion and dismissed the case with prejudice. (App. 3.) The Scotts' Petition for Appeal to the Supreme Court of Virginia was refused as was their motion for re-hearing. (App. 1.)

The facts relevant to the Petition relate more to the procedural history of Scott seeking to overturn the 2001 Order than to the trial court's decision to

dismiss this lawsuit. Scott has a long and unsuccessful history of filing frivolous lawsuits in the local state and federal courts. Unfortunately, only a small portion of that history is in the Appendix.

The 2001 Order is a point of beginning. Scott filed several lawsuits against Norfolk Southern Corporation, the last of which was filed in the Norfolk Court in 1999 (the "Norfolk Southern Case"), naming as defendants the corporation's officers, directors, certain employees and several outside lawyers (collectively, the "Norfolk Southern Defendants"). Because Scott raised federal issues in the case, the case was removed to the United States District Court for the Eastern District of Virginia ("District Court"). An answer was not filed in the Norfolk Court. The case was dismissed in the District Court, after which Scott filed a motion for default judgment ("Default Motion") in the Norfolk Court. In his Default Motion, Scott alleged the Norfolk Court retained jurisdiction over the case despite its removal to District Court because of defective service of the removal notice. The Norfolk Court found that the Default Motion was nothing more than a part of Scott's continuous pattern of filing vexatious and frivolous lawsuits against Norfolk Southern and, as such, entered the 2001 Order. Scott sought an appeal of the 2001 Order to the Supreme Court of Virginia which denied review (the "2001 Appeal"). Scott also filed a Petition for a Writ of Mandamus in that court ("2001 Petition"), seeking a ruling on the Default Motion. The court denied the 2001 Petition.

In recognition of his obligation under the 2001 Order to seek leave of court before filing lawsuits, Scott submitted himself to the jurisdiction of the Norfolk Court and sought leave to file lawsuits on July 24, 2003, and again on January 31, 2008. On January 31, 2008, the Norfolk Court granted Scott leave to file a lawsuit in Virginia Beach to protect property he owned in Virginia Beach from a foreclosure sale scheduled for February 6, 2008. Scott, however, did not file the lawsuit before the foreclosure sale occurred. Instead, the Scotts sued seeking money damages against some of the respondents for wrongful foreclosure ("Virginia Beach I"). Because the Scotts raised federal claims in Virginia Beach I, it was removed to the U.S. District Court where it was subsequently dismissed for violating the terms of that court's pre-filing injunction entered in 2005 against both of them.

After dismissal of Virginia Beach I, and without seeking further leave from the Norfolk Court, the Scotts filed Virginia Beach II seeking essentially the same relief and named additional defendants. Rather than respond to the allegations contained in Virginia Beach II, some respondents filed a Motion to Intervene in the Norfolk Southern Case, and a Show Cause Motion, seeking a contempt order against Scott for violation of the 2001 Order for filing Virginia Beach II without leave of court. The Norfolk Court granted the Motion to Intervene, (App. 44, in response to which Scott filed a Petition for Writ of Prohibition and Writ of Mandamus ("Petition I") in the Supreme Court of Virginia in which he again attacked the 2001 Order and the Norfolk Court's jurisdiction to grant the Motion to Intervene. The court dismissed Petition I on November 25, 2008.

On August 20, 2008, the Norfolk Court conducted a trial on the Show Cause Motion, during which Scott presented evidence in support of Virginia Beach II. During the trial the Norfolk Court indicated that Scott could be guilty of criminal contempt. Scott then filed a Motion to Stay and a second Petition for Writ of Prohibition and Writ of Mandamus (collectively, "Petition II"), this time in the Virginia Court of Appeals. Petition II was denied on November 6, 2008.

On October 28, 2008, the Norfolk Court entered the October Order for violating the 2001 Order and imposed sanctions, including ordering Scott to dismiss Virginia Beach II. However, Scott filed a motion of nonsuit of his involvement in the case, to which respondents objected and moved for dismissal per the October Order. The parties submitted briefs, and after oral argument on January 23, 2009, the trial court sustained respondents' objection, denied the motion of nonsuit, and dismissed Virginia Beach II.

ARGUMENT SUMMARY

Petitioners seek reversal of the dismissal of a lawsuit they had no right to file in the first instance. Michael Scott is subject to a prefiling injunction from the Circuit Court of Norfolk entered in 2001 which the Virginia Supreme Court declined to review. His challenge to the 2001 Order comes too late.

The 2001 Order is not a prior restraint on court access. Scott failed to obtain permission to file the instant case, subjecting the case to dismissal and Michael Scott to contempt. As a sanction the Norfolk

Court found Scott in civil, not criminal, contempt and ordered that he dismiss the lawsuit.

Contrary to the intent of the sanctions order that the lawsuit be dismissed with prejudice, Scott sought a dismissal without prejudice by seeking an order of nonsuit. His attempt at a nonsuit was denied and the case was dismissed with prejudice after notice and an opportunity to be heard. Scott had no property interest in his right to a nonsuit.

Terry Scott was not a necessary party to the October Order as the Order related to the lawsuit, not to her, and she had no property right in a lawsuit that was a nullity.

ARGUMENT

1. Michael Scott's challenge to the 2001 Order in this Court is time barred.

a. Scott has Waived his Right to Claim that the Injunction Order is Void.

Scott has made a career of filing meritless lawsuits against those whom he believes have done him an injustice. This Petition is no exception. At the heart of this Petition is the 2001 Order. As demonstrated by the factual background set forth above, Scott has sought to overturn the 2001 Order on at least four other occasions, all of which were unsuccessful.

The Norfolk Court never lost personal jurisdiction over Scott to permit or deny his right to file lawsuits anywhere in Virginia, authority confirmed by the Virginia Supreme Court's denial of

the 2001 Petition for Appeal and the denial of Petition I. He had 90 days within which to seek review in this Court. He never did so.

Moreover, Scott later twice availed himself of the Norfolk Court's jurisdiction after entry of the 2001 Order, demonstrating Scott's tacit -- if not explicit -- acknowledgment of the Norfolk Court's appropriate exercise of personal jurisdiction.

b. **Scott's Challenge to the 2001 Order is Barred by *Res Judicata*.**

Principles of *res judicata* prevent the Scotts from resurrecting claims on which the Virginia Supreme Court issued a decision on the merits. In Virginia, the refusal of a petition for appeal constitutes a decision on the merits. *Sheets v. Castle*, 263 Va. 407, 411, 559 S.E.2d 616, 619 (2002); *Saunders v. Reynolds*, 214 Va. 697, 700, 204 S.E.2d 421, 424 (1974) ("[w]e state unequivocally that a decision to grant or refuse a petition for writ of error is based upon one equally-applied criterion — the merits of the case"); *see also Wright v. West*, 505 U.S. 277, 283 (1992) ("the Supreme Court of Virginia refused the petition — a disposition indicating that the [C]ourt found the petition without merit"); *Jackson v. Virginia*, 443 U.S. 307, 311 n.4 (1979) ("[e]ach petition for writ of error under Va. Code § 19.2-317 (1975) is reviewed on the merits . . . and the effect of a denial is to affirm the judgment of conviction on the merits"); *Dodson v. Director of Dep't of Corrections*, 233 Va. 303, 307 n.5, 355 S.E.2d 573, 576 n.5 (1987) ("[i]n Virginia, aside from appeals from a capital murder conviction, criminal appeals to both the Court of Appeals and to this

Court are discretionary, and 'a decision to grant or refuse a petition [for appeal] is based upon one equally-applied criterion — the merits of the case.'" (citation omitted)). Scott's 2001 Appeal sought reversal of the 2001 Order. The denial of that appeal was a decision on the merits.

Likewise, when Scott filed Petition I to the Virginia Supreme Court, he again challenged the Norfolk Court's jurisdiction to re-open the Norfolk Southern Case for purposes of the Motion to Intervene and Show Cause for violating the 2001 Order. He argued that the 2001 Order applied only to the Norfolk Southern Defendants, and respondents had no standing to intervene. Exercising jurisdiction is a discretionary act by a trial court and will not be reviewed on a writ of mandamus, absent an abuse of discretion. *See In re Commonwealth's Attorney*, 265 Va. 313, 576 S.E.2d 458 (2003) (dismissing writ of mandamus because mandamus does not lie to review discretionary, judicial acts of the court, e.g., rendering certain judgments).

Although respondents were not parties in the Norfolk Southern Case, as intervenors they were privies of the Norfolk Southern Defendants, in that they shared an identity of legal interest; i.e., both parties sought to prevent Scott from filing additional lawsuits absent the Norfolk Court's approval. *See Leeman v. Troutman Builds, Inc.*, 260 Va. 202, 206, 530 S.E.2d 909, 911 (2000) ("[A] party to the present suit, to be barred by [*res judicata*], must have been a party to the prior litigation, or represented by another so identified in interest with him that he represents the same legal right.") (emphasis added).

The refusal to grant a writ because the trial court exercised its discretion has precedential value. Under principles of *res judicata*, the denial of Petition I barred Scott from challenging the Norfolk Court's jurisdiction to enter the 2001 Order or the order allowing respondents to intervene. *See Bates v. Devers*, 214 Va. 667, 672 n.8, 202 S.E.2d 917, 922 n.8 (1974) (defining a cause of action, under principles of *res judicata* as an "assertion of particular legal rights which have arisen out of a definable factual transaction."); *See also Scales v. Lewis*, 261 Va. 379, 382, 541 S.E.2d 899, 901 (2001) ("The doctrine of *res judicata* precludes parties from relitigating the same cause of action when a valid, final judgment was previously entered.").

2. **The Scotts had all the due process to which they were entitled.**

In Questions Presented 1, 2, 4 and 5 petitioners complain that the trial court violated their Fourteenth Amendment due process and equal protection rights when it dismissed their case without notice (Question 1), in reliance on the October Order which allegedly found Scott in criminal contempt (Question 2), and applied the October Order to Terry Scott when she was not a party to the Show Cause Motion (Question 4). In Question 5 petitioners say the trial court lacked jurisdiction to dismiss the case when not all the defendants were before the court. Wading through the excess verbage it can be concluded that petitioners are making procedural due process claims because the trial court did not give notice that it might dismiss the case and Terry Scott was not a party to the October Order.

However, it is not just the October Order on which the trial court relied in dismissing this case, rather it was the 2001 Order that the trial court found the petitioners violated.

Looked at in its entirety, this Petition is all about the 2001 Order. When the Norfolk Court entered that order it intended that no lawsuit to which Scott was a party could be filed without that court's consent. The Scotts knew that when Scott sought and obtained permission to file Virginia Beach I to which Terry Scott was a party plaintiff. Knowing he would likely not be granted permission to file Virginia Beach II Scott devised a scheme to hold Terry Scott out as a lone plaintiff, attacking the 2003 foreclosure of their Zypher property. The transparency of that effort is revealed by the fact that the Zypher property was owned jointly and Scott would have benefited from a lawsuit the court would not likely have granted him leave to bring. Therefore, it can only be the 2001 Order, and not the October Order, that the trial court found Scott violated and applicable to Virginia Beach II.

a. **The Scotts received notice.**

In Question 1 the Scotts complain that the trial court did not give them notice that it might dismiss the case nor did it give them opportunity to be heard. (Pet. 19.) Both statements are incorrect but the absence of an adequate appendix cannot show that. However, they acknowledge that the petitioners (sic) filed an objection to Scott's motion for nonsuit and sought dismissal of the entire case (Pet. at 11,19.). The dismissal order also recites the fact of notice and argument from the Scotts. (App. 3.)

b. The October Order did not impose criminal sanctions.

Although Question 2 asserts that the October Order imposed criminal sanctions the argument in support relates only to the 2001 order as imposing criminal sanctions. (Pet. 16.)

Scott contends that the 2001 Order was a finding of criminal contempt and, because the October Order imposed sanctions for its violation, the October Order was also a finding of criminal contempt and a violation of his due process rights. (Pet. 19.) Like Petition I, the denial of Petition II also has precedential value. In Petition II, Scott sought a writ of prohibition and writ of mandamus in the Virginia Court of Appeals, claiming the 2001 Order is a criminal sanction, and that respondents' Show Cause Motion was a criminal prosecution. Petition II was refused. Scott sought review in the Virginia Supreme Court. That too was refused. Those arguments are now repeated in this Petition and the denial of Petition II precludes Scott from re-litigating those issues now. (Pet. 24.) *See Bates*, 214 Va. at 672, 202 S.E.2d at 922; *see also Scales*, 261 Va. at 382, 541 S.E.2d at 901.

It is also important to note that while Scott contends that the Norfolk Court found him in criminal contempt when it entered the October Order, the Order is clear that the court found him in civil contempt. (App. 41.)

c. **The October Order applied to Virginia Beach II, not Terry Scott individually.**

Scott has all but conceded that Virginia Beach II could not have been brought without permission from the Norfolk Court and dismissal of the Longmont Road claim was appropriate. (Pet. 31.) However, the Scotts insist that Terry Scott was acting alone in that portion of the Complaint which related to the 2003 foreclosure of the Zypher property. (App. 27-34.) Again, without an adequate Appendix the court cannot know the tortured path the Zypher property litigation followed in the U.S. District Court and the Fourth Circuit Court of Appeals. But the trial court had that history (App. 3.) as did the Norfolk Court when it entered the October Order. (App. 45.) It is significant to point out that in the litigation in the District Court both the Scotts were parties plaintiff and the court found the action so frivolous that it entered a pre-filing injunction as well.

It is not denied that Terry Scott knew of the 2001 Order. Forewarned, she joined in a lawsuit she knew was subject to dismissal. She filed her own pleading in opposition to the respondents objection to nonsuit and motion to dismiss. Had she filed her own motion for nonsuit the outcome might have been different, but she never presented that option to the trial court. Her claim of denial of both procedural and substantive due process is baseless.

3. The Scotts had no property interests of which they were deprived.

In Question Presented 3 Scott claims that he had a Fourteenth Amendment property interest in the October Order and the trial court's refusal to grant his motion for nonsuit deprived him of that property right. In Question Presented 6 the Scotts claim they had had a protected property interest in the statutory default against certain respondents when they did not file a responsive pleading in the trial court but instead pursued contempt in the Norfolk Court against Michael Scott. As with the rest of the Scotts' claims, these too are without merit.

a. Scott had no vested right and property interest.

Scott argues that he had a "vested right and property interest" in his ability to comply with the October order and that he was deprived of this right when the lower court refused to grant him a nonsuit. (Pet. 25.) Scott also contends that he had a "constitutionally protected property interest" in his right to a nonsuit.

Pursuant to the Fourteenth Amendment, states and their instrumentalities may not "deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV. As this Court has observed, "[t]he Fourteenth Amendment's procedural protection of property is a safeguard of the security of interests that a person has already acquired in specific benefits. These interests -- property interests -- may take many forms." *Bd. of*

Regents of State Colls. v. Roth, 408 U.S. 564, 576 (1972). Significantly, in order to state a claim under the Fourteenth Amendment, a party must allege a cognizable property interest. *Id.* at 571. "Property interests, of course, are not created by the Constitution," but stem instead "from an independent source such as state law." *Id.* at 577. In order to possess a protected property interest, one "must have more than an abstract need or desire for it . . . [or] a unilateral expectation of it," and "must, instead, have a legitimate claim of entitlement to it." *Id.*

Under Virginia law, Scott had no legitimate right to assert a property interest in the October Order or his right to take a nonsuit. There is no Virginia law that entitles Scott to the right to comply with the October order. Thus, without a legitimate claim of entitlement, he does not have a property interest protected by the Fourteenth Amendment.

Moreover, Scott did not have a property interest in his ability to take a nonsuit because pursuant to Virginia law, he did not have a legitimate claim of entitlement to a nonsuit under the circumstances of this case. Under Virginia Code § 8.01-380(B), a plaintiff may take one nonsuit as a matter of right; however, "only a validly pending proceeding can be nonsuited." *Johnston Mem' Hosp. v. Bazemore*, 277 Va. 308, 313, 672 S.E.2d 858, 861 (2009). "If an action is a nullity, regardless of the reason it is such, then no legal proceeding is pending that can be nonsuited." *Id.* at 314, 672 S.E.2d at 861.

In *Johnston Memorial Hospital*, the plaintiff filed a wrongful death action prior to qualifying as administratrix of her husband's estate. *Id.* at 310, 672 S.E.2d at 859. Because only the personal representative of a decedent's estate may institute a wrongful death action, the plaintiff did not have standing to bring the case. *Id.* at 312, 672 S.E.2d at 860. On appeal, the plaintiff argued that the lower court was proper in granting her a nonsuit because it was the only remedy available to her. *Id.* at 314, 672 S.E.2d at 861. The Virginia Supreme Court disagreed, stating that her action was without legal effect and therefore concluding that the lower court erred in granting the nonsuit. *Id.* at 312, 672 S.E.2d at 862.

Also, in *Kone v. Wilson*, 272 Va. 59, 630 S.E.2d 744 (2006), the Virginia Supreme Court held that the plaintiff's complaint was invalid and without legal effect because the plaintiff signed the pleading in a representative capacity and was not authorized to practice law. *Id.* at 62, 630 S.E.2d at 746. Consequently, the court affirmed the lower court's dismissal of the action with prejudice. *Id.* at 62-63, 630 S.E.2d at 745-46.

Similarly, in *Nerri v. Adu-Gyamfi*, 270 Va. 28, 613 S.E.2d 429 (2005), the court held that the pleading was invalid and, therefore, the plaintiff could not nonsuit the proceeding. At the time the attorney signed the complaint his license to practice law had been administratively suspended. *Id.* at 30, 613 S.E.2d at 430. The attorney was not authorized to practice law, and as a result, the pleading was invalid and had no legal effect. *Id.* at 31, 613 S.E.2d at 430. The court held that it was error for the lower

court to grant the nonsuit under such circumstances. *Id.*

The circumstances of this case are analogous to the above cases in which the Virginia Supreme Court held that the plaintiff was not entitled to a nonsuit. Scott initiated this action and signed the pleadings when he was barred from doing so by court order. This situation is no different than the attorney who signed the pleadings when he was not authorized to practice law or when a plaintiff signs a pleading in a representative capacity when he is not authorized to practice law. *See Kone*, 272 Va. at 62, 630 S.E.2d at 746; *Nerri*, 270 Va. at 30, 613 S.E.2d at 430. Under both of these circumstances, the Virginia Supreme Court declared the proceeding a nullity and without legal effect. *Kone*, 272 Va. at 63, 630 S.E.2d at 746; *Nerri*, 270 Va. at 31, 613 S.E.2d at 430. Thus, when Scott initiated the action in violation of the 2001 Order, the proceeding was also a nullity and without legal effect.

b. **The Respondents were not in default.**

The Scotts also argue that they had a protected property interest in respondents' alleged statutory default and that they were deprived of this interest in violation of their rights under the Fourteenth Amendment. In order to state a claim under the Fourteenth Amendment, the Plaintiff must allege a cognizable property interest. *Roth*, 407 U.S. at 571.

The Scotts say that respondents made a general appearance in the trial court when they opposed the Scotts' July 8, 2008, Motion for

Temporary Injunction and then did not file responsive pleadings in that Court. (Pet. 34.)

When the U.S. District Court dismissed Virginia Beach I, the Scotts filed a Motion for Reconsideration but, rather than pursuing that motion, they filed Virginia Beach II and sought service by mail. Only MERS accepted service. In the interim, after the foreclosure, respondent US Bank, NA, the holder of the defaulted note, filed an unlawful detainer action in the Virginia Beach General District Court. Rather than litigating the unlawful detainer action there, Scotts filed the Motion for Temporary Injunction in the trial court, seeking to enjoin the action pending in General District Court. Instead of sending notice of the Motion for Injunction only to US Bank, the Scotts noticed all respondents. Counsel for US Bank and counsel for the other respondents appeared to object to jurisdiction when a representative of US Bank advised that it had taken a nonsuit of the unlawful detainer action, making the request for injunction moot. The motion was dismissed.

c. **No general appearance.**

Respondents did not make a general appearance on July 8, 2008, in response to the Scotts' motion to enjoin US Bank from pursuing its unlawful detainer action. Respondents appeared to object to the court's jurisdiction for several reasons. First, a circuit court could not hear a motion to enjoin an unlawful detainer action as general district courts have exclusive jurisdiction over such actions pursuant to Virginia Code § 16.1-77(3). If the Scotts were unsuccessful in their defense in that court, they

had an automatic right of appeal to the Circuit Court pursuant to Virginia Code § 16.1-106. This statutory procedure provided the Scotts an adequate remedy at law, obviating any need to invoke the Circuit Court's jurisdiction in equity for injunctive relief. Further, respondents were prepared to argue that because the matter was currently pending in the General District Court, the Circuit Court lacked jurisdiction under Virginia Code § 17.1-513. Circuit Courts "have original and general jurisdiction of all civil cases, ... except such cases as are assigned to some other tribunal...." Va. Code Ann. § 17.1-513. However, because US Bank had earlier taken a nonsuit of the pending unlawful detainer action, and for that reason the preliminary injunction was now moot, respondents never advanced their objection to the court's jurisdiction.

d. **Further responsive pleadings not required.**

By timely filing the Motion to Intervene in the Norfolk Court rather than responsive pleadings in the trial court, no further response was necessary once the Norfolk Court took jurisdiction. The obligation to file a response in the trial court was suspended until after a decision by the Norfolk Court.

> The main rule which preserves the two systems of courts from actual conflict of jurisdiction is that the court which first takes the subject matter of litigation under its control, whether this be person or property, must be permitted to exhaust its remedy, to

> attain which it assumed control, before the other court shall attempt to take it for its purpose. See *Covell v. Heyman*, 111 U.S. 176, 4 S. Ct. 355, 28 L. Ed. 390.

Wilkinson v. Youell, 180 Va. 321, 326, 23 S.E.2d 356, 358 (1942).

Principles of comity support the Court's action in deferring to the Norfolk Court which retained jurisdiction over the plaintiffs by virtue of the 2001 Order. *See Am. Online, Inc. v. Anonymous Publicly Traded Co.*, 261 Va. 350, 361, 542 S.E.2d 377, 383 (2001) (*citing Oehl v. Oehl*, 221 Va. 618, 623, 272 S.E.2d 441, 444 (1900), for the following guidance:

1. the foreign court had personal and subject matter jurisdiction to enforce its order within its own jurisdiction;

2. the procedural and substantive law applied by the foreign court was reasonably comparable to that of Virginia;

3. the foreign court's order was not falsely or fraudulently obtained;

4. the enforcement of the foreign court's order was not contrary to the public policy of Virginia, or prejudicial to the rights of Virginia or her citizens.

In Re Estate of Edwards, No. CL78932 2009 WL 3344854 (Prince William County Cir. Ct. Jan. 14, 2009).

Scott submitted himself to the jurisdiction of the Norfolk Court, at least as late as January 31, 2008, when he sought and obtained leave to file Virginia Beach I. That Court did not lose jurisdiction over him merely because he did not follow the same path before filing the instant case.

Furthermore, under Virginia Supreme Court Rule 3:8, a trial court has discretion to allow more time for the filing of responsive pleadings. If the court has discretion to act under the rule, then it necessarily follows that the Scotts could not have a legitimate claim of entitlement to application of this rule. *See Biser v. Town of Bel Air*, 991 F.2d 100, 104 (4th Cir. 1993); *Gardner v. City of Baltimore Mayor & City Council*, 969 F.2d 63, 68-72 (4th Cir. 1992). The Scotts, at best, had nothing more than an abstract need, desire, or unilateral expectation that the court would hold the defendants in statutory default due to the fact that the pleadings were not filed within twenty-one days. This unilateral expectation is insufficient to state a property interest protected under the Fourteenth Amendment. *See Roth*, 407 U.S. at 577.

Moreover, as discussed above, the proceeding was a nullity and without legal effect; therefore, the court was not permitted to award the Scotts relief or hold the respondents in default. Accordingly, the Scotts did not have a legitimate claim of entitlement to the respondents' statutory default and therefore did not possess a property interest within the cognizance of the Fourteenth Amendment.

4. **The October Order is not Void for Want of Necessary Parties.**

Throughout the Petition, the Scotts argue that the October Order is void because, among other reasons, Terry Scott was a necessary party to the Show Cause Motion to which she was not joined. (Pet. 27.) However, Scott never raised this argument in the Norfolk Court or objected to the Show Cause proceeding going forward without adding her as a party. The argument comes too late in this Petition.

Scott contended in his Petition for Appeal in the Virginia Supreme Court that, in that portion of Virginia Beach II that refers to the Zephyr property, Terry Scott alone was the plaintiff, and, second, the Norfolk Court found her in violation of the 2001 Order by ordering that Scott dismiss Virginia Beach II. In contrast, in this Petition they say the trial court found Terry Scott in violation of the October Order. Regardless, by relating the Zephyr property claim only to Terry Scott, the Scotts are trying to create a separate cause of action for her in the Complaint. The claim overlooks the requirement that all counts in a complaint be separately set out. That is not apparent from reading the Complaint. The argument also overlooks the fact that before its foreclosure, the Zephyr property was owned by the Scotts jointly, and, consistent with their position that Terry Scott is a necessary party to the Show Cause Motion, then Michael Scott would be a necessary party for complete relief prayed for regarding the Zephyr property. The Scotts cannot have it both ways. Therefore, either Michael Scott is a necessary party to the Zephyr claim, in order for the trial court to grant the relief prayed for, or Terry

Scott was not a necessary party to the Show Cause Motion.

Any argument that the Norfolk Court found Terry Scott in violation of the 2001 Order would likewise be frivolous. Scott does not contest that he did not return to the Norfolk Court to seek relief to file Virginia Beach II. The effect of that failure meant that Virginia Beach II was an unauthorized law suit, subject to dismissal, without regard to the fact that Terry Scott was a party plaintiff or that it involved property in which she had an interest.

For good measure, the Scotts also argue that the October Order is void because other defendants were not included in the Motion to Intervene. (Pet. 32.) Landmark's Motion to Dismiss in Virginia Beach had been granted, so it was no longer a party. Neither Prime Equity nor Edward Barcliff had been served with the Complaint, so they were not in the case at that point. And MERS was inadvertently left out of the Motion to Intervene but was permitted by order to file a late response. In any event, it is safe to say that none of the absent defendants would object to the court's ruling. Here, the respondents were seeking to have the Norfolk Court enforce the 2001 Order against Scott, the party who was the subject of the Order. The relief sought was the dismissal of the lawsuit that could not have been filed unless he alone got permission to do so. None of the other parties to the case were necessary to be before the Court in order for it to grant complete relief. They were not "... materially interested either legally or beneficially in the subject matter or event of the suit...," i.e., the Motion to Intervene and Show

Cause. *Jett v. DeGaetani*, 259 Va. 616, 619, 528 S.E.2d 116, 118 (2000).

CONCLUSION

This meritless Petition for Writ of Certiorari was filed for no purpose other than to cause the Respondents to incur the cost necessary to respond to it. This is more of an abuse of civil process which should not go unpunished, especially when recognizing the prior decision of the Supreme Court of Virginia relating to the issues raised in this Petition. Respondents request that this Petition be denied and that Respondents be awarded such other relief as justice may require.

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Respectfully Submitted,

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